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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-40

HAROLD R. HOKE, M.D.,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA; DR. JOSEPH W. HOOPER, JR.; DR. BRYANT L. GALUSHA; DR. C.T. PARTRICK; DR. JACK POWELL; DR. CHARLES B. WILKERSON, JR.; DR. FRANK EDMONDSON; DR. J. JEROME PENCE; DR. DAVID S. CITRON; DR. E. WILSON STAUB; DR. VERNON W. TAYLOR; their agents, assigns, successors in interest, and those acting in concert with them, all individually, and in their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Harold R. Hoke, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit entered in this proceeding on April 10, 1979.

OPINIONS BELOW

The decision of the three-judge panel of the United States District Court for the Western District of North Carolina remanding the case for decision by a single judge, rendered June 6, 1975, appears at 395 F.Supp. 357. It is reprinted in the Appendix to this Petition at 1a. The decision of a single judge of the same court granting respondents' motion for summary judgment, on February 23, 1978, appears at 445 F.Supp. 1313. It is reprinted in the Appendix at 12a. The United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court on April 10, 1979, wrote no opinion. Its decision appears at 595 F.2d 1217, and is reprinted in the Appendix at 23a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 10, 1979. This petition is filed within 90 days of that judgment. Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Whether the risk of unfairness in combining investigative, prosecutorial and adjudicative powers in a single agency is "intolerably high," *Withrow* v. *Larkin*, 421 U.S. 35, 58 (1975), in a medical licensure revocation proceeding where

(a) the state Board of Medical Examiners delegated the investigation entirely to its attorney and no physicians participated;

(b) that attorney's law firm was representing a client in litigation against the physician;

(c) at least one member of the Board which voted to prosecute the physician was affiliated with a hospital engaged in litigation against him;

(d) no current or former patients or medical colleagues of the physician were interviewed;

(e) the investigation leading to the preferment of charges was limited to reading newspaper clippings, interviewing former employees of the physician and reviewing litigation files in other cases involving the physician; and

(f) the investigator stated that he was under no duty to be fair and impartial.

2. Whether members of a state Board of Medical Examiners are immune from damage liability for pressing professional charges against a physician on the basis of a bad faith "investigation" performed at their direction by a non-medical investigator, where they made no independent inquiry, beyond reading articles in the lay press, to determine the medical validity of the charges, and where at least one participating member of the Board was affiliated with a hospital engaged in litigation with the physician.

3. Whether summary judgment was proper in the circumstances of this case, notwithstanding the presence of issues concerning the credibility of witnesses, the impartiality of members of the Board of Medical Examiners and the good faith of the Board members in acting on the recommendation of their investigator.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Constitution of the United States, reads in pertinent part, as follows:

> [N] or shall any State deprive any person of life, liberty, or property, without due process of law; . . .
>
> * * *

42 U.S.C. §1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

N.C. Gen. Stats. § 90-14 (Supp. 1971) is reprinted in the Appendix at 25a.

STATEMENT OF THE CASE

On September 20, 1974, the North Carolina Board of Medical Examiners issued nineteen charges against petitioner, a licensed physician, and noticed a hearing to determine whether his license should be revoked.[1]

[1] N.C. Gen. Stats. § 90-14 (Supp. 1971) empowers the Board to investigate, prosecute and adjudicate charges against physicians and to revoke licenses to practice medicine. The charges against petitioner, in substance, were that he had performed abortions negligently and without adequate pregnancy tests; that he had knowingly performed "spurious" abortions; that he had solicited patients for his clinic by means of a brochure containing false representations; and that his mental condition rendered him unfit to practice medicine. See *Hoke* v. *Board of Medical Examiners*, 395 F.Supp. 357, 358 n.1 (W.D.N.C. 1975) (3 judge court). (App. 2a.) (Citations to "(App. ____.)" are to the Appendix to this petition.)

The charges were the product of an investigation conducted by the Board's General Counsel, John Anderson. The Board directed Anderson to investigate petitioner following a flurry of adverse newspaper publicity concerning him.[2] No physician participated in the investigation, even though the charges alleged negligent and improper medical treatment.[3]

At least one member of the seven-person Board which ordered the investigation and preferred the charges was affiliated with Charlotte Memorial Hospital, which was then engaged in litigation with petitioner.[4] In addition, Anderson's law firm was defending a client in separate litigation brought by petitioner and frequently represented the insurance company

[2] Following the newspaper reports, the Board requested Anderson "to 'find out whatever he could' about the statements made in the press." *Hoke* v. *Board of Medical Examiners*, 445 F.Supp. 1313, 1315 (W.D.N.C. 1978). (App. 15a.)

[3] Anderson admitted that he conducted the investigation without the participation of any doctor and indeed without even consulting a specialist in petitioner's field. (J. A. 118) (Citations to "(J.A.____.)" are to the Joint Appendix in the Court of Appeals.) Moreover, the District Court found "no evidence . . . which suggests that individual Board members [all physicians] participated in the investigation other than by reading the original articles which appeared in the newspapers." 445 F.Supp. at 1315. (App. 16a.)

[4] Two members of the Board at present are employed by Charlotte Memorial Hospital. The record reflects that one of them was a member of the Board when the charges were issued. The record is unclear as to whether the other was a member at that time.

which covered both Charlotte Memorial Hospital and Presbyterian Hospital, which was also in litigation against petitioner. Prior to the commencement of the investigation, petitioner's attorney had been threatened by the attorney for Presbyterian Hospital that persistence in the litigation could lead to proceedings to revoke petitioner's medical license.

Pursuant to the Board's directive, attorney Anderson conducted an investigation limited, as the District Court found, to "newspaper reports, conversations with former employees of [petitioner] and an examination of affidavits and documents in a suit involving Charlotte Memorial Hospital."[5] Anderson did not interview petitioner, or any current or former patients of petitioner, or any member of the medical community favorable to petitioner. Nor did he consult any physician specializing in petitioner's field, obstetrics and gynecology.

The charges recommended by Anderson, and adopted by the Board, included an allegation that petitioner had performed "spurious" abortions on "various" women who were not pregnant. No such women were named, and Anderson had admittedly not interviewed or obtained the records of any of petitioner's patients.[6]

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[5] 445 F.Supp. at 1315. (App. 15a.)

[6] Anderson testified on deposition that his investigation was limited to what the written record revealed. (J. A. 121.) He then testified:

> Q. . . . The Board had brought charges against Dr. Hoke allegedly for performing an abortion on someone who was not pregnant when, in fact, there was no investigation for the records and from your responses to see whether or not in fact she was pregnant.
>
> A. Mr. Elam, I am not here to explain that. I don't explain it.

(J.A. 128.)

In performing his investigation, Anderson later testified, he did not consider that he had any duty to be fair, unbiased or impartial.[7] While admitting to the limited scope of his investigation in petitioner's case, Anderson refused under oath to answer any questions concerning any guidelines or procedures of the Board for the conduct of investigations generally or to testify concerning the procedures followed in other investigations during his twenty years as counsel to the Board.

Acting exclusively on Anderson's recommendation and without any independent inquiry of its own, the Board, including the employee of the hospital petitioner had sued, issued the charges against petitioner.[8] No formal vote was ever taken on the charges, which were drafted by Anderson and one Board member.[9]

Petitioner brought suit in the United States District Court for the Western District of North Carolina under 42 U.S.C. § 1983, seeking (a) declaration that N.C. Gen. Stats. § 90-14 (Supp. 1971), which empowered the Board to investigate, prosecute and adjudicate the charges, contravened the due process clause

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[7] As Anderson put it at his deposition:

> Q. Don't you have a duty to be fair, unbiased and not prejudicial?
>
> A. No.
>
> Q. You don't?
>
> A. No.

(J. A. 121.)

[8] Anderson refused to state whether he had made any recommendation to the Board. (J.A. 144-46). However, the District Court found on the basis of the deposition testimony and affidavits of the Board members that they "relied entirely on the report by Anderson and on charges made in the press." 445 F.Supp. at 1315. (App. 16a.)

[9] 445 F.Supp. 1316. (App. 16a.)

of the Fourteenth Amendment, and (b) an injunction against holding the licensure revocation hearing. A three-judge court was convened and heard argument.

While the matter was pending before the three-judge court, this Court handed down its decision in *Withrow* v. *Larkin*, 421 U.S. 35 (1975), holding that a similar statute did not constitute a denial of due process on its face merely because the investigative, prosecutorial and adjudicative functions were combined in a single agency. The Court expressly recognized, however, that in "special facts and circumstances" such a combination of functions might present an "intolerably high" risk of unfairness. 421 U.S. at 58.

In light of *Withrow* the three-judge court declined to hold § 90-14 unconstitutional. However, it remanded the case to a single District Judge, granting petitioner leave to amend his complaint to allege "special facts and circumstances." *Hoke* v. *Board of Medical Examiners*, 395 F.Supp. 357, 362 (W.D.N.C. 1975) (App. 10a.)

Petitioner amended his complaint to allege "special facts and circumstances" and to add a claim for damages against the Board and its individual members.

Following discovery the District Court granted the defendants' motion for summary judgment on both the injunctive and damage claims. *Hoke* v. *Board of Medical Examiners*, 445 F.Supp. 1313 (W.D.N.C. 1978) (App. 12a.) It held that petitioner had failed as a matter of law to make out "special facts and circumstances" justifying an injunction against the Board

proceeding to hear its own charges against petitioner.[10] 445 F.Supp. at 1317-18 (App. 19a-21a.) It also held that the Board, as an agency of the State of North Carolina, could not be sued for damages and that the individual members of the Board were immune from suit as a matter of law in the circumstances of this case. On the latter question, the District Court concluded that the Board members were entitled only to a qualified good-faith immunity, but refused to hold them responsible for the manner in which Anderson conducted the investigation in their name or for adopting his recommendations without independent inquiry of their own. 445 F.Supp. at 1316-17. (App. 17a-18a.)

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed without opinion. *Hoke* v. *Board of Medical Examiners*, 595 F.2d 1217 (4th Cir. 1979). (App. 23a.)

Petitioner seeks a writ of certiorari to review (1) the holding below that petitioner failed to demonstrate "special facts and circumstances" under *Withrow* v. *Larkin* justifying the conclusion that the risk of unfairness in the Board's adjudicatory proceedings is "intolerably high"; (2) the scope of immunity from damage liability to which members of a state agency

[10] In so ruling, the District Court relied heavily on affidavits to the effect that the two Board members associated with the hospital sued by petitioner would not participate in the hearing and that three other Board members had been appointed after the charges against petitioner were filed. 445 F.Supp. at 1317. (App. 20a.) It also relied on self-serving, conclusory affidavits from the Board members that they could give petitioner a fair hearing. *Id.* at 1317-18. (App. 20a)

combining investigative, prosecutorial and adjudicative functions are entitled; and (3) the propriety of summary judgment in this case, given the obvious need for a trier of fact to weigh the credibility of witnesses, the impartiality of the Board members and the good faith of the Board members in their reliance upon Anderson's "investigation" of petitioner.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict With Applicable Decisions of this Court, or at a Minimum Presents Major Questions Concerning the Interpretation of a Decision of this Court Significantly Affecting the Quality of Justice in Administrative Proceedings.

In *Withrow* v. *Larkin, supra,* this Court reversed a holding by a three-judge District Court that a state medical licensure board could not, consistent with due process, engage in the investigation, prosecution and adjudication of charges against a physician. The Court concluded that any such contention "must overcome a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. It held that in light of this presumption and prior decisions of this Court any *per se* rule against the combination of prosecutorial and adjudicative functions in the same agency would be inappropriate.

The Court was clearly sensitive, however, to the inherent potential for unfairness in a situation where the same individual or group conducts an investigation, reviews the files for "probable cause" and orders a prosecution, and ultimately sits in judgment on the conflict between the prosecutorial presentation of its staff (which it authorized) and the defense presented by the object of its prior attentions. The Court focused on

> a realistic appraisal of psychological tendencies and human weaknessses, [in determining whether] conferring investigative and adjudicative powers on the same individuals poses such a risk

> of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

421 U.S. at 47.

In light of this sensitivity the Court concluded:

> That the combination of investigative and adjudicatory functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

Id. at 58.[11]

It is difficult to conceive a stronger set of "special facts and circumstances" than the present case. Both the investigator and the Board were permeated by obvious conflicts of interest. No meaningful investigation was performed. No physician participated in the investigation. The lawyer who ran it merely read some newspaper clippings and a court litigation file

[11] Without limiting in any way the scope of "special facts and circumstances," the Court in *Withrow* noted that

> various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

421 U.S. at 47 (footnotes omitted).

While neither Anderson nor any member of the Board appears to have had a "pecuniary interest in the outcome," there was at least a strong professional interest in discrediting the man who was litigating against Anderson's firm's client and the employer of at least one member of the Board.

and interviewed some ex-employees of petitioner. No patients of petitioner or physicians were interviewed. And the investigator himself arrogantly declared his liberation from any duty of fairness or impartiality.

Yet on the basis of this incredible excuse for an "investigation," the Board decided without formal vote to bring professional charges against a practicer of an unpopular (though constitutionally protected, *Roe* v. *Wade*, 410 U.S. 113 (1973)), specialty, who was then in litigation against a client of the investigator and the employer of at least one member of the Board. The notion that this physician can obtain a fair and impartial hearing before his accusers is preposterous; it plainly flies in the face of "a realistic appraisal of psychological tendencies and human weaknesses." *Withrow* v. *Larkin, supra*, at 47.

The significance of this case, however, transcends the fact that the courts below plainly misapplied the decision in *Withrow*.[12] This Court in *Withrow* recognized the enormous and growing impact of the administrative process in the resolution of disputes at every level of the state and federal governments. See 421 U.S. at 51-53. Thus the articulation of guidelines for what constitute "special facts and circumstances" requiring the separation of prosecutorial and adjudicative functions is vital to the administration of justice in the broad range of personal and economic disputes committed to resolution outside the courts.

[12] The decision below contrasts starkly with the decisions of other lower federal courts applying the "special facts and circumstances" test of *Withrow*. See *Association of National Advertisers* v. *FTC*, 460 F.Supp. 996 (D.D.C. 1978); *Huber Pontiac, Inc.* v. *Allphin*, 431 F.Supp 1168 (S.D. Ill. 1977); *National Rifle Association* v. *United States Postal Service*, 407 F.Supp. 88 (D.D.C. 1976).

Moreover, this Court has in recent years displayed an increasing awareness of and concern with the constitutional and other legal implications of the traditionally closed procedures by which the "learned professions" have regulated themselves. See, *e.g.*, *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

The North Carolina Board of Medical Examiners is both an agency of the State and an arm of the private medical profession. Its actions have a vital dual import—the protection of the public against unqualified practitioners and the control of the membership of the profession. In cases like the present one, what is at stake is nothing less than a person's right to pursue his chosen livelihood.

The Board's total control over petitioner's ability to pursue his profession is instinct with the danger of unfairness, the prospect that an unpopular person will be hounded from the ranks, not for reasons truly related to his competence but because other private practitioners simply do not like him or the way he conducts himself. That danger of unfairness becomes "intolerably high" where, as here, neither the statutory scheme nor those charged with administering it provide any mechanism for insulating the accused from investigators and prosecutors burdened with gross conflicts of interest or from slipshod, unprofessional and biased investigative methods.

The importance of this case to the administration of state professional licensing schemes and to the administrative process in general is, we submit, clear.

2. There Is a Conflict in the Decisions of the Lower Federal Courts on the Question of Immunity from Damage Liability in these Circumstances, Which Should Be Resolved by this Court.

In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), this Court held that a prosecutor acting strictly within the confines of the duties of his office is absolutely immune from tort liability for the performance of his official functions. The Court recognized, however, that a lower level of protection might be appropriate where the prosecutor steps outside the narrow confines of his prosecutorial role. *Id.* at. 430-31 & n.33.

The District Court here assumed without deciding "that Anderson's investigative activities would be subject to a qualified immunity only," 445 F. Supp. at 1316 (App. 17a.), and cast the issue as "whether the individual Board members should be held liable under the principle of *respondeat superior* for possible misconduct by the Board's investigator." *Id.*

On this issue the District Court recognized a conflict among the lower courts in the wake of this Court's decision in *Rizzo* v. *Goode*, 423 U.S. 362 (1976). See 445 F. Supp. at 1316. (App. 17a-18a) Compare *Roach* v. *Kligman*, 412 F. Supp. 521, 528 (E.D. Pa. 1976) ("actual participation" or "actual knowledge" of principal required), with *Shifrin* v.*Wilson*, 412 F. Supp. 1282, 1301 n. 22 (D.D.C. 1976) (negligence or failure to act by principal is sufficient). See also *Duchesne* v. *Sugarman*, 566 F.2d 817, 830(2d Cir. 1977).

The District Court concluded:

> In this case all the evidence assembled to date shows that individual Board members had no

> knowledge or awareness of any of the acts complained of by plaintiff. Furthermore, given the long relationship between Anderson and the Board, it cannot be said that the Board members were negligent in not suspecting in this particular instance that Anderson's investigation might be inadequate or biased. For these reasons the court is unwilling to conclude that the Board members could be held liable solely because Anderson acted as agent or employee of the Board.

445 F. Supp. at 1316. (App. 17a-18a)

We submit the District Court was clearly in error and that the Board members were not immune under either standard. Even if they were unaware of Anderson's conflict of interest, they could not have been unaware of the total inadequacy of his investigation. By failing to satisfy themselves on this score or to conduct any independent inquiry into the facts underlying the charges, the Board clearly acted negligently, *Shifrin* v. *Wilson, supra*, and by accepting an investigator's report which contained no evidence of medical records, interviews of patients or consultations with experts in the field, the Board actually and knowingly ratified a patently inadequate and unprofessional job, *Roach* v. *Kligman, supra.*

Moreover, we submit, this case cannot properly be analyzed under the rubric of *respondeat superior.* The statute commits the entire conduct of licensure revocation proceedings to the Board, which has no authority to delegate any portion of its responsibilities. Like any public authority, it may make use of its staff in carrying out its duties, but it is inconceivable that the physicians on the Board can delegate the investigative function with respect to medical practices to

a lay investigator.[13] Anderson was acting in their name in gathering facts, but the investigation was—and had to be—their act. The Board members were responsible under the statute for the charges issued in their name and for the adequacy of the factual investigation justifying the issuance of the charges. See *Duchesne* v. *Sugarman, supra*, 566 F. 2d at 830-33.

Viewed in this light, there is still conflict and uncertainty over the scope of the immunity, if any, to which the Board members are entitled, and the decision below is clearly contrary to the weight of authority.

The performance of the investigative function has not traditionally been cloaked with the same broad immunity as the purely prosecutorial or judical functions. See *Imbler* v. *Pachtman, supra*, 424 U.S. at 430-31 & n.33; cf. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The decision below conflicts with decisions in other circuits according much

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[13] There is no legal foundation for the statement by the District Court that "the function performed by Anderson was one separate and distinct from that reserved by the Board members to themselves." 445 F.Supp. at 1316. (App. 18a.) Indeed, the court went on to reveal the bootstrap character of this argument by saying:

> The only way to preserve the immunity to which Board members are entitled when preferring or hearing charges is to respect the separation of roles between the Board and Anderson which had been worked out over a long relationship.

Id. at 1317. (App. 18a.)

This, of course, begs the question, which is whether such immunity ought to be "preserved" in the investigative sphere. Moreover, the statute cannot be read to carve out the "separation of roles" on which the court relied.

narrower protection to prosecuting officers engaged in performance of investigative functions, see, *e.g.*, *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977); *Jennings* v. *Shuman*, 567 F. 2d 1213 (3rd Cir. 1977); *Guerro* v. *Mulhearn*, 498 F. 2d 1249 (1st Cir. 1974); *Robichaud* v. *Ronan*, 351 F. 2d 533 (9th Cir. 1965), and it was expressly left open in *Imbler*, see 424 U.S. at 430-31.

In view of the widespread confusion among the lower federal courts as to the existence or scope of immunity in the investigative area and the evident importance of the question, witnessed by the series of decisions by this Court in recent years on a range of immunity issues, see *Imbler* v. *Pachtman*, *supra*; *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 415 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967), this Court should grant the writ to resolve the question.

3. Summary Judgment Was Plainly Inappropriate in the Circumstances of this Case.

We need not belabor the point with citations, but under the Federal Rules and the Constitution, summary judgment is appropriate only if there are no genuine factual disputes to resolve.

In this case summary judgment was granted, even though the parties were in sharp dispute over the existence of "special facts and circumstances" rendering the Board's proceeding dangerously unfair and over the question of the Board members' good faith in acting on Anderson's report for purposes of invoking immunity.

"Special facts and circumstances" and "good faith" are preeminently factual issues requiring a fully developed record before an impartial trier of fact prepared to resolve, among other things, issues of credibility.[14]

The grant of summary judgment was plainly in conflict with applicable decisions of this Court. See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[14] The impropriety of summary judgment in this case is highlighted by the District Court's heavy reliance on conclusory, self-serving affidavits from Board members to the effect that they could weigh the charges against petitioner impartially. 445 F.Supp. at 1317-18. (App. 20a.) *But see, e.g., Duchesne* v. *Sugarman, supra*, 566 F.2d at 832-33; *Safeguard Mutual Ins. Co.* v. *Miller*, 456 F.Supp. 682, 694 (E.D. Pa. 1978).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari were served on each of the following: John H. Anderson, Esquire, Smith, Anderson, Blount and Mitchell, First Union National Bank Building, Raleigh, North Carolina, 27602; and H.C. Hewson, Esquire, Jones, Hewson, and Woolard, 1000 Law Building, Charlotte, North Carolina, 28202 by depositing true copies thereof in the United States mail, first-class, postage prepaid, on this 9th day of July, 1979.

EARL C. DUDLEY, JR.

APPENDIX

HAROLD R. HOKE, *Plaintiff,*

v.

BOARD OF MEDICAL EXAMINERS OF the STATE OF NORTH CAROLINA et al.,

Defendants.

No. C-C-75-01.

United States District Court,
W.D. North Carolina
Charlotte Division.

June 6, 1975.

Before CRAVEN, *Circuit Judge,* JONES, *Chief District Judge,* and MCMILLAN, *District Judge.*

CRAVEN, *Circuit Judge*:

This three-judge court was convened to consider a doctor's attack on certain aspects of the procedure pursuant to which the state's Board of Medical Examiners (the Board) revokes a license to practice medicine. Sought, *inter alia*, is permanent injunctive and declaratory relief against provisions allegedly defective under the fourteenth amendment's due process clause.

The plaintiff, Dr. Harold Hoke, has since November 1973 operated Hallmark Clinic, a private abortion clinic in Charlotte, North Carolina. On September 20, 1974, the Board noticed in writing nineteen "Charges and Allegations," all of which, as paragraph 19 itself alleged, showed that Dr. Hoke had "engaged in dishonorable and unprofessional conduct unworthy of and affecting" his practice and

that therefore grounds existed for revocation of his license.[1]

The complaint[2] sets out two levels of attack on the Board's move to revoke Hoke's license. As to the revocation *procedure*: (a) the Board's combined role under the statute[3] as investigator, prosecutor, and judge renders it inherently biased; (b) the statutory standard—"unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession"—is vague and overbroad;

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[1] The numbered charges, with varying degrees of specificity, alleged in substance that Hoke had negligently handled patients undergoing abortion; had performed abortions without adequate pregnancy tests; had knowingly performed spurious abortions; had solicited false accusations against other doctors in disputes arising in Charlotte and Cartersville, Georgia, where Hoke had previously practiced; had solicited medical practice through a brochure describing Hallmark Clinic, which contained false representations; and finally that his mental condition rendered him unable safely to practice medicine.

The complaint informed Hoke that a public hearing to determine the truth of the charges would be held on October 30, 1974, at which time he could appear with counsel, cross-examine witnesses, and present his own evidence. He was also invited to file a written response to the charges. The hearing was later postponed until February 10, 1975.

[2] Filed January 2, 1975, the complaint also requested a temporary restraining order against the proposed Board hearing on February 10, 1975. It was not necessary to enter such an order, however, since the Board agreed to postpone the hearing at least until this court had rendered a decision.

[3] N.C.Gen.Stats. § 90—14 (Supp.1971) provides:

> The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or is habitually addicted to the use of marijuana, barbiturates, demerol or

and (c) since, assertedly, his former patients could constitutionally refuse to appear at a "public"[4] hearing—claiming infringement of their right of privacy under *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)—*his* right to present witnesses in his own behalf

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> any other habit-forming drug or derivative of such drug, or has by false and fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds an earned diploma or degree, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude, or has been adjudicated a mental incompetent or whose mental condition renders him unable safely to practice medicine. Upon the hearing before said Board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. And, for any of the above reasons, the said Board of Medical Examiners may refuse to issue a license to an applicant. The findings and actions of the Board of Medical Examiners in revoking or rescinding and refusing to issue licenses under this section, shall be subject to review upon appeal to the superior court, as hereinafter provided in this article. The Board of Medical Examiners may, in its discretion, and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked and rescinded.

[4] N.C.Gen.Stats. § 90—14.2 (1965) directs the Board to hold a public hearing on the charges. The Charlotte Observer, in connection with Hoke's case, sued the Board in state court to enjoin the Board's apparent practice of conducting the hearing in private when the doctor requested it. The court found § 90—14.2's language mandatory and entered an injunction in favor of the newspaper. The Board apparently did not appeal.

will be substantially impaired. Secondly, many of the specific *substantive* charges would, if revocation were based at least in part thereon, infringe his constitutional rights under the first, fifth, and fourteenth amendments.[5]

Hoke's prayer for relief is specific: a permanent injunction prohibiting the Board from proceeding against him under the September 1974 charges;[6] a declaratory judgment that § 90—14 violates the due process clause for the aforementioned reasons; an order requiring any Board hearing to be held *in camera*; and declaratory relief (and in two instances injunctions) against the constitutionally defective charges.

As a three-judge court, in the present posture of this case, we need reach only the claim that § 90—14, the underlying authority for the proceeding against Hoke, is itself violative of the due process clause. Whether a subsequent revocation based wholly or in part upon charges implicating Hoke's constitutional rights would be void is a question which, assuming ripeness at this stage, would

[5] *E.g.*, Hoke asserts that ¶s 6 and 8 are unconstitutionally vague because they accuse him of performing spurious abortions on "various" females, without specifying names, dates, or other particular circumstances; that ¶ 16 charging unethical advertising and solicitation simply by distribution of a pamphlet describing Hallmark's services is void under the first amendment. Many of the charges of inadequate and unprofessional testing and operating procedures are challendged both as subjecting Hoke to standards that have never been applied to other doctors and as interfering with the freedom of discretion, in the doctor-patient relationship, that is necessarily protected by Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 § 973).

[6] Two more charges were brought and noticed to Hoke in December 1974, one alleging unnecessary surgery and the other relating to a misdemeanor charge in Georgia. The present record does not reveal the wording of these latest charges.

not turn on the unconstitutionality of a state *statute*,[7] *i.e.*, § 90—14. Any injunctive relief prohibiting the Board from basing revocation, say, on Hoke's distribution of a brochure, as protected by the first amendment, could be granted by a single judge without reaching § 90—14. Whether an order requiring an *in camera* hearing—contrary to § 90—14.2 as construed by the state court—can or should issue is a question which, assuming it touches upon the constitutionality of § 90—14.2 as applied, is not, as we view the record, ripe for adjudication at this stage.[8] Hoke's

[7] 28 U.S.C. § 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The distinction set out in *Ex parte* Bransford, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249 (1940), is applicable here:

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action.

310 U.S. at 361, 60 S.Ct. at 951 (footnotes omitted). *See also* Steffel v. Thompson, 415 U.S. 452, 457, n. 7, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 968-70 (2d ed. 1973).

[8] *See, e.g.*, Golden v. Zwickler, 394 U.S. 103, 108—10, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

claim that he will be deprived of the right to present evidence on his behalf depends at least on: the nature of the evidence presented against him; the extent to which that evidence could be arguably rebutted by his former patients; whether and to what extent those patients have a privilege of refusing to testify or even appear; and the extent to which that privilege, if recognized, is asserted. The most Hoke can assert at this stage is that it is conceivable that on review of a then-completed public revocation hearing a court could conclude that Hoke's defense was so materially disabled as to deny him due process. The question is presently wholly speculative, and we decline to consider it.

Thus, reaching the twin charge that § 90—14 impermissibly co-mingles investigatory, prosecutorial, and adjudicatory functions and grounds revocation upon a vague and overbroad standard, for reasons which follow we deny the requested injunctive relief and remand to the single-judge court for its resolution of those particularized claims not requiring our attention under 28 U.S.C. § 2281.

I.

Hoke alleges that, according to standard practice, each member of the Board to some degree participated in the preceding months in the investigation and development of the facts which ultimately led to the September 1974 charges;[9] that each member after this review voted to prefer charges; and that each member of the seven-man Board plans to sit in judgment on the validity of the charges. In exposing the Board to one side of the facts and implicitly requiring it to make a kind of probable cause determination, this procedure, in his view, creates an inherent bias towards vindicating the Board's initial judgment when it sits as final adjudicator. The Board's procedure under §90-14, therefore, deprives an accused physician of the due process right to have disputed facts weighed and evaluated by an impartial hearing body.

[9] In light of the subsequent deposition of the Board's retained attorney, John Anderson, that he performed most of the investigative groundwork and thereafter presented the results to the Board, Hoke in his supplemental memorandum has softened his initial allegation somewhat. But while there might be a dispute on the facts, we deem it immaterial for purposes of our analysis. *See* Withrow v. Larkin, 421 U.S. 35, 54 n. 20, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), discussed *infra*. We also note that the Board has recently hired a full-time investigator, but that change, if induced by Hoke's action does not affect our decision. *Id.*, 421 U.S. at 46 n. 13, 95 S.Ct. 1456.

Hoke's position rested primarily on *Larkin v. Withrow*, 368 F.Supp. 796 (E. D.Wis.1973) (three-judge court).[10] The Wisconsin scheme authorized the state's medical hearing board to "investigate, hear and act upon practices" by doctors and order temporary suspensions.[11] Since the statute co-mingled the three functions the doctor stood to lose his liberty or property without "the intervention of an independent, neutral and detached decision maker." 368 F.Supp. at 797. Finding imminent irreparable injury and a high likelihood of success on the merits, the court entered a preliminary injunction against further procedures under the challenged statute. Hoke has vigorously asserted that his case is identical with, if not stronger than, *Larkin v. Withrow, supra*, since here the Board can revoke and not simply suspend.

But how we might have applied the reasoning of the Wisconsin district court is irrelevant, for the Supreme Court has unequivocally and unanimously reversed. *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). The Court noted previous cases in which "the adjudicator has a pecuniary interest in the outcome" or "has

[10] *See also* Larkin v. Withrow, 368 F.Supp. 793 (E.D.Wis.1973) (convening three-judge court).

[11] The Wisconsin board was required to initiate proceedings through a district attorney in state court in order to effect a permanent revocation. 368 F.Supp. at 797.

been the target of personal abuse or criticism from the party before him, "saying of them: "In [endeavoring to prevent even the probability of unfairness], various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Id.*, 421 U.S. at 47, 95 S.Ct. at 1464. Distinguishing the Wisconsin doctor's argument, the Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id., 421 U.S. at 47, 95 S.Ct. at 1464. The Court rejected the doctor's attempt to show inherent bias, noting that, for example, the pretrial involvement of a judge in probable cause determinations has never been seen as a barrier to that judge's presiding over a later trial or even sitting as the trier of fact. Also, administrative agencies typically receive the results of investigations, file charges, and sit at the subsequent hearing, all in conformity with the due process clause. *Id.*, 421 U.S. at 56, 95 S.Ct. 1456.

We are of course bound by the holding that the combination in an agency of investigative and adjudicatory functions does not itself violate due process, and we deem it controlling in this case. The only material difference in North Carolina's procedure is that the Board itself is empowered to revoke, whereas in Wisconsin the medical board could revoke only by instituting a quasi-criminal

action.[12] But there is no suggestion in the Court's opinion that the combination of functions in Wisconsin's board presented less risk of actual bias because it could order only a temporary suspension, and that therefore combined functions in a board with permanent revocation power might be more vulnerable. The generality of the holding is in the opposite direction. "The initial charge or determination of probable cause and the *ultimate adjudication* have different bases and purposes. The fact that the *same agency* makes them in tandem and that they relate to the same issues does not result in a procedural due process violation." *Id.*, 421 U.S. at 58, 95 S.Ct. at 1470 (emphasis added). In other words, whether a medical board's ultimate decision results in temporary or permanent revocation, the due process analysis is the same.

Although we hold § 90-14 on its face and as generally applied to physicians does not deny due process under *Withrow*, we note the Court's *caveat*:

> That the combination of investigative and adjudicatory functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect. . . .

Id., 421 U.S. 58, 95 S.Ct. 1470. Hoke's complaint and supporting papers allude to the possibility that certain past and present members of the Board might be prejudiced against him because of prior litigation involving Charlotte Memorial Hosital,[13] of whose Executive Com-

[12] *See* n. 11 *supra.*

[13] *See* Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (W.D.N.C.1974); *cf.* Hallmark Clinic v. North Carolina Dept. of Human Resources, 380 F.Supp. 1153 (E.D.N.C.1974) (three-judge court).

mittee of the Visiting Staff" (sic) they are *ex officio* members. Hoke states that charges brought against him by the hospital in moving to deny him staff privileges "overlap almost 100% with the charges brought by the Board," thus raising the inference of a vendetta. We of course express no opinion on the ultimate validity of these assertions. But since the Supreme Court's reversal in *Withrow* of Hoke's primary authority has occurred so recently, it is understandable that Hoke's complaint and supporting memoranda do not address themselves to the theory of relief expressed in the *caveat*. And, in the present posture of this case, no facts have been found which would bear on the existence or non-existence of actual bias by certain Board members against Hoke.

For these reasons, on the remand to the single-judge court, Hoke should be given an opportunity to file, in good faith, amended pleadings directed to any "special facts and circumstances present in [this] case," from which the court might conclude, after finding the facts, that "the risk of unfairness [to Hoke] is intolerably high." *Id.*, 58 U.S. at ____, 95 S.Ct. at 1470. Since any relief Hoke might secure on this exception to *Withrow's* broad holding would not require injunctive relief against the Board on the basis that § 90-14 was unconstitutional, the single judge is empowered to adjudicate this claim, if raised.

II.

Hoke's claim that § 90-14's standard for revocation is unconstitutionally vague and overbroad merits little discussion. In *Jones v. Penny*, 387 F.Supp. 383 (M.D.N.C.1974) (Craven, J.), a three-judge court considered a vagueness attack on a motor vehicle code licensing provision applicable to those whose mental competency was suspect. The language "competent to operate a motor vehicle with safety to persons and property" was held sufficiently informative under the due process clause. *Id.*,

387 F.Supp. at 392. Cited as controlling were recent Supreme Court decisions upholding, against contentions of vagueness, "for such cause as will promote the efficiency of the service," *Arnett* v. *Kennedy*, 416 U.S. 134, 158, 94 S.Ct. 1633, 1646, 40 L.Ed.2d 15 (1974), and conduct "unbecoming an officer and a gentleman," *Parker v. Levy*, 417 U.S. 733, 757, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974). Likewise, we find that § 90-14's language itself and in conjunction with established medical ethics sufficiently informs physicians of the standards by which they are to conduct themselves and their practice, and we so hold. As for overbreadth, Hoke's attack on § 90-14 only marginally raises first amendment claims. The charges against Hoke relate almost exclusively to his conduct. "Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constituionally proscribable . . . conduct . . . .' *United States Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 580-581, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)." *Parker v. Levy, supra*, at 760, 94 S.Ct. at 2563. We therefore decline to invalidate § 90-14 as overbroad.

Accordingly, to the extent that Hoke's complaint rests on an attack on § 90-14 as violative of the due process clause, we deny the requested injunctive and declaratory relief. We otherwise remand to the single-judge court for further proceedings consistent with this opinion, namely consideration of the claims that several of the specific charges, if revocation were predicated thereon, would deny Hoke's constitutional rights. Hoke should also be given the opportunity to amend his complaint to allege facts relevant to the *caveat* expressed in *Withrow*.

An appropriate judgment will be entered.

HAROLD R. HOKE, M.D. *Plaintiff,*

v.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF
NORTH CAROLINA, Dr. Joseph W. Hooper, Jr., Dr. Bryant L. Galusha, Dr. C. T. Partick, Dr. Jack Powell, Dr. Charles B. Wilkerson, Jr., Bryant D. Paris, Jr., Dr. Frank Edmondson, Dr. J. Jerome Pence, Dr. David S. Citron, Dr. E. Wilson Staub, Dr. Vernon W. Taylor, Jr., their agents, assigns, successors in interest, and those acting in concert with them, all Individually and in their official capacities,

Defendants

No. C-C-75-001.

United States District Court,
W.D. North Carolina,
Charlotte Division

Feb. 23, 1978.

ORDER

McMILLAN, *District Judge.*

This case is before the court on defendants' motion for dismissal of all damages claims and for summary judgment on the remaining portions of the complaint which seek injunctive and declaratory relief. A hearing was conducted on December 13, 1977, and the parties were given until January 20, 1978, to file such further briefs or evidence as they wished. The motions are now ready for decision.

A. THE DAMAGES CLAIMS

The Board of Medical Examiners is an agency of the State of North Carolina. See N.C.G.S. §§ 90—1 *et seq.* Defendants correctly contend, therefore, that the Board is

not a "person" within the meaning of 42 U.S.C. § 1983 and cannot be subject to a suit for damages. *Huntley v. North Carolina State Board of Education*, 493 F.2d 1016 (4th Cir. 1974); *Alabama Optometric Association v. Alabama State Board of Health*, 379 F.Supp. 1332 (M.D. Ala. 1974) *cf. Mazzuco v. State Board of Medical Examiners*, 31 N.C.App. 47, 228 S.E.2d 529 (1976), *cert. denied*, 291 N.C. 323, 230 S.E.2d 676 (1977). Although plaintiff alternatively seeks to sue the Board directly under the Fourteenth Amendment, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), this claim must also fail. Such a suit is barred by the Eleventh Amendment. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083, 45 U.S.L.W. 3822 (1977); *Mauclet v. Nyquist*, 406 F.Supp. 1233 (W.D.N.Y. and E.D.N.Y. 1976) (three-judge court), *aff'd* 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977); *cf. Hallmark Clinic v. North Carolina Dept. of Human Resources*, 519 F.2d 1315, 1318 (4th Cir. 1975). The Board has not waived its immunity. Accordingly, the damages claim against the Board itself will be dismissed.

As to the claim of immunity from damages made by the individual Board members, both parties agree that there is no basis for distinguishing between an action brought under 42 U.S.C. § 1983 and one grounded directly on the Fourteenth Amendment. The immunity from suit of judicial and quasi-judicial officers derives from the common law; it is not something peculiar to § 1983 or to any other consitutional, statutory or common law cause of action. *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971).

Where the parties vigorously disagree is on the entitlement of the individual Board members to invoke a judicial or quasi-judicial immunity. Such a claim of immunity depends not on the title of the officer but on whether the alleged conduct which gives rise to the complaint involved the performance of a judicial or quasi-judicial function.

Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *cf. Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975) (state parole board members have quasi-judicial immunity in considering parole applications); *Ginger v. Circuit Court for the County of Wayne*, 372 F.2d 621 (6th Cir. 1967) (members of state bar grievance committee and state judges have immunity for actions taken in disciplinary proceedings); *Moity v. Louisiana State Bar Association*, 414 F.Supp. 180, 184 n.17 (E.D.La.), *aff'd* 537 F.2d 1141 (5th Cir. 1976) (state bar association entitled to quasi-judicial immunity when passing upon applications for admission to the bar). Plaintiff's contention that only "traditional officers of the court," such as judges, prosecutors and grand jurors, can invoke the immunity must be rejected.

In disciplinary actions under N.C.G.S. § 90-14 the Board of Medical Examiners performs a tripartite function as investigator, prosecutor and adjudicator. Plaintiff's contention that the combination of these three functions in a single body deprives him of due process of law has been rejected by the decision of the three-judge panel in this case. *Hoke* v. *Board of Medical Examiners*, 395 F.Supp.357 (W.D.N.C. 1975), relying on *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Although this merger of roles has been held not to offend due process, it does complicate the decision of defendants' immunity claims.

In *Imbler v. Pachtman* the Court recognized that there would be some circumstances where a prosecutor acting in an administrative or investigative capacity would not be entitled to the absolute immunity which attaches to his performance of more strictly prosecutorial duties. 424 U.S. 430, 431 n. 33, 96 S.Ct. 984, 47 L.Ed. 2d 128; see also *Helstoski v. Goldstein*, 552 F.2d 564 (3d. Cir. 1977); *Briggs v. Goodwin*, 186 U.S. App.D.C. ____, 569 F.2d 10 (1977); *Weathers v. Ebert* 505 F.2d 514, 517 (4th Cir. 1974).

The Court recognized that drawing a line between protected and non-protected activities would be difficult, but it left no doubt that the decision to initiate a prosecution was clearly within the scope of the prosecutor's role as a quasi-judicial officers.

Plaintiff bases his liability claim against the individual Board members on the following sequence of events. The court has drawn upon plaintiff's own version of the story as stated in briefs and oral argument on the present motion.

In response to newspaper reports in the *Charlotte Observer*, Dr. Joseph Hooper, then president of the Board, and possibly also Dr. Frank Edmondson, then secretary of the Board, requested on behalf of the full Board that Mr. John H. Anderson, the Board's attorney, undertake an investigation to determine whether charges should be brought against plaintiff. Mr. Anderson had served as the Board's attorney for over twenty years and had frequently conducted preliminary investigations on information received by the Board. The request made was a general one: Anderson was to "find out whatever he could" about the statements made in the press. At the time the newspaper articles appeared plaintiff had two suits pending in this court, one against Presbyterian Hospital of Charlotte and the other against Charlotte Memorial Hospital.

It is plaintiff's claim that Anderson conducted a biased and one-sided investigation, ignoring or refusing to inquire into the existence of evidence which would rebut charges made against plaintiff. Plaintiff complains that Anderson made no effort to speak with him or make a first-hand investigation of his clinic. The investigation was primarily based on newspaper reports, conversations with former employees of plaintiff, and an examination of affidavits and documents filed in the suit involving Charlotte Memorial Hospital.

Discovery has turned up no evidence to date which suggests that individual Board members participated in the investigation other than by reading the original articles which appeared in the newspapers. The members of the Board relied entirely on the report by Anderson and on charges made in the press. Several of them stated in deposition that they had always had full confidence in Anderson and had seen no reason to doubt his word in the case involving plaintiff.

Sometime in the late summer of 1974, on the basis of Anderson's oral report to the Board, the Board voted to prefer charges covering all the alleged incidents about which Anderson had gathered information. Formal charges were drafted by Anderson and by Dr. Hooper and were served on plaintiff; no formal vote was taken on the final draft as a whole or on specific charges. An additional charge was added in the fall of 1974 based on a subsequent report from Anderson concerning a pending misdemeanor prosecution against plaintiff.

It is alleged that the decision to investigate was in part prompted by a letter from the president of the Mecklenburg County Medical Soceity to the Board's executive secretary concerning plaintiff's fitness to practice medicine. One Board member (Dr. Galusha) recalled this letter, but several others did not. Plaintiff also contends that his attorney in the case agaist Presbyterian Hospital was informed by the hospital's lawyer that if he persisted with the suit he would probably have his license revoked by the Board. Again, however, discovery has failed to turn up any evidence that this statement emanated from or reflected the views of any of the Board members themselves. The attorney for the hospital had no formal association with the Board, and there is no evidence that he had discussed the Presbyterian case with any individual Board members.

Finally, plaintiff claims that Anderson's investigation was necessarily suspect because his law firm was contemporaneously representing a defendant in another lawsuit filed by plaintiff in the Eastern District of North Carolina and because Anderson's firm also occasionally represented clients at the request of the insurance company which provided coverage for Presbyterian and Charlotte Memorial Hospitals. None of the Board members examined in deposition confessed any knowledge of Anderson's supposed conflicts.

The Board's decision to prefer charges is indistinguishable from a prosecutor's decision to initiate a criminal proceeding or a grand jury's decision to return a criminal indictment. For this reason the court concludes that the individual Board members are not answerable in damages for their decision to bring charges against plaintiff.

This determination does not end the matter. Even though the Board members had no personal involvement in the investigation, Anderson did act as the Board's agent. Assuming, but not deciding, that Anderson's investigative activities would be subject to a qualified immunity only, there is a question whether the individual Board members should be held liable under the principle of *respondeat superior* for possible misconduct by the Board's investigator. If so, then damages could be recoverable against Board members if it were found that the investigation was not conducted in good faith and in some way offended a right secured by the Constitution or by federal statute.

The status of *respondeat superior* in actions under 42 U.S.C. § 1983 (and presumably also under *Bivens*) has been somewhat clouded by the decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). *Compare Roach v. Kligman*, 412 F.Supp. 521, 528 (E.D.Pa.1976) (plaintiff must show "actual participation" or "actual knowledge" of unlawful conduct) *with Shifrin v. Wilson*, 412 F.Supp. 1282, 1301 n. 22 (D.D.C.1976) (negligence or failure to act by supervisor can support liability). In this

case all the evidence assembled to date shows that individual Board members had no knowledge or awareness of any of the acts complained of by plaintiff. Furthermore, given the long relationship between Anderson and the Board, it cannot be said that the Board members were negligent in not suspecting in this particular instance that Anderson's investigation might be inadequate or biased. For these reasons the court is unwilling to conclude that the Board members could be held liable solely because Anderson acted as agent or employee of the Board.

More important is the fact that the function performed by Anderson was one separate and distinct from that reserved by the Board members to themselves. If the Board members can be held liable for the investigative acts of their agent, then they face the prospect of suit in every disciplinary proceeding where it can be alleged that the preliminary investigation was deliberately biased. The Board members would effectively lose the immunity that protects them when performing their quasi-judicial or judicial duties. The only way to preserve the immunity to which Board members are entitled when preferring or hearing charges is to respect the separation of roles between the Board and Anderson which had been worked out over a long relationship. For these reasons the court finds that the Board members are not answerable for any damages arising out of the investigation conducted by John Anderson.

As a final item the court notes that the Board's executive secretary, Bryant D. Paris, Jr., is named as a defendant in this suit. While it does not appear that Paris would be entitled to the protection of any absolute or qualified immunity, a review of the record also leaves the court unclear as to just what Paris' involvement is alleged to have been and on what basis damages against him are sought. The parties are invited to provide enlightenment on these questions. The ruling concerning defendants' motion to dismiss the damages claims will, for now, cover

only the claims against the Board itself and against the individual Board members.

B. MOTION FOR SUMMARY JUDGMENT

On June 6, 1975, the three-judge court which was convened to consider Plaintiff's facial challenges to N.C.G.S. § 90-14 ruled adversely to plaintiff on the claims for relief contained in paragraphs 83(1) and 83(2) of the complaint and did not address the claim made in paragraph 83(4), holding that it was not ripe for decision. The case was remanded to this court for further proceedings, including an opportunity for plaintiff to demonstrate the existence of specific bias by the Board members which would entitle him to an injunction against further action by the Board, See *Withrow v. Larkin*, 421 U.S. 35, 58, 95 S.Ct. 1456, 45 L.Ed.2d 712 (1975). On November 3, 1975, plaintiff amended his complaint to allege the existence of specific bias resulting from (a) his instituting litigation against Charlotte Memorial Hospital, (b) the one-sided investigation conducted by John Anderson, (c) the fact that present or past members of the Board are or have been on the staff of Charlotte Memorial Hospital, and (d) the existence of adverse publicity against plaintiff.

On August 16, 1977, defendants moved for summary judgment on the issue of specific bias. They also moved for summary judgment on the claim by plaintiff that he is disabled from presenting witnesses in his behalf at the Board hearing in view of the requirement of N.C.G.S. § 90-14.2 that such hearing be open to the public and in view of the fact that some of his former patients may be unwilling to testify at a public hearing. These two issues will be disposed of in reverse order.

On June 30, 1977, the North Carolina legislature amended N.C.G.S. § 90-16 to permit the Board to take testimony in executive session concerning the treatment of patients who have not consented to public disclosure of such treatment. The amendment further provided that records of

such testimony would not be considered public records. The amendment was to be effective immediately upon ratification. In view of this action by the legislature, plaintiff's claim set out in paragraph 83(4) is moot and will be dismissed. See 1977 North Carolina Session Laws ch. 838.

In support of their motion for summary judgment on the issue of bias defendants have offered affidavits from the two present members of the Board who are associated with Charlotte Memorial Hospital stating that they will not participate in the hearing of charges against plaintiff. Defendants have also shown by affidavit that two members of the Board became members after November 1, 1976, and that one member did not join the Board until after the original charges were preferred (but before the amendment adding the charge involving plaintiff's shoplifting prosecution). Defendants have also tendered affidavits from the two remaining Board members who were on the Board in 1974 at the time charges were preferred; both state under oath that they will be able to afford plaintiff a fair hearing.

While the burden of showing entitlement to summary judgment is on the defendants, once they have offered evidence in support of the motion plaintiff cannot rest upon the bare allegations of his complaint. Aside from the allegations of the amended complaint, plaintiff has produced nothing to substantiate his claim that the pending suit against Charlotte Memorial Hospital will irrevocably prejudice the minds of the Board members against him. The withdrawal of the two present Board members having an association with the hospital is evidence of the Board's good faith and its intention of affording plaintiff a fair hearing. The affidavit from plaintiff's attorney in the Presbyterian Hospital case is not relevant to the issue of present bias. That litigation was long ago terminated adversely to plaintiff. Furthermore, there is no evidence of any adverse publicity involving plaintiff since the original flurry of articles some three or four years ago.

The real substance of plaintiff's amended complaint is the contention that the minds of the Board members have become so fixed by the events of 1974 and by the investigative report of John Anderson that they cannot now afford him a fair hearing. Such a claim certainly cannot be made as to the two members of the Board who joined in 1976; it is only slightly less implausible with regard to the one member who joined the Board after the original charges were preferred in 1974. The *caveat* in *Withrow* is a narrow one; it requires a showing that there are "special facts and circumstances" which make the risk of unfairness "intolerably high." 421 U.S. at 58, 95 S.Ct. 1456, 45 L.Ed.2d 712. In the court's judgment plaintiff's amended complaint has progressed very little, if at all, beyond the original claim that the Board cannot grant a fair hearing because it also receives investigative reports and decides to prefer charges. In view of the substantial evidence of good faith presented by the affidavits of Drs. Galusha and Citron and in view of the change in composition of the Board since charges were originally preferred, the court concludes that defendants are entitled to summary judgment on the issue of "special facts and circumstances" constituting bias or prejudice.

C. PROSPECT

This case is now more than three years old. In light of the ruling of the three-judge court and the decisions made in this order, it appears to the court that the only matters remaining for decision are plaintiff's claims that he may not constitutionally be disciplined on the basis of some of the specific charges brought against him. The parties are requested to confer and attempt to draw a "roadmap" setting out the remaining issues in the case and whether they can be disposed of without trial. If a trial will be necessary, the court reaffirms its intention, expressed in the memorandum of August 16, 1976, of trying *Hoke v. Charlotte Memorial Hospital*, No. C-C-74-44), first.

IT IS THEREFORE ORDERED:

1. Defendants' motion to dismiss the damages claims against the Board and against the individual Board members is allowed, with the *caveat* stated above as to Mr. Bryant Paris, Jr.

2. The claim set out in paragraph 83(4) of the complaint is dismissed as moot.

3. Defendants' motion for summary judgment on the issue of specific bias is allowed. It is understood that this ruling disposes of the claim set out in paragraph 83(1) of the complaint.

4. The parties will advise the court by March 15, 1978, of whatever progress they have made in mapping out the remaining issues for decision.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1436

Harold R. Hoke, M.D.,

Appellant,

v.

Board of Medical Examiners of the State of North Carolina, Joseph W. Hooper, Jr., Bryant L. Galusha, C.T. Partrick, Jack Powell, Charles B. Wilkerson, Frank Edmondson, J. Jerome Pence, David S. Citron, E. Wilson Staub, Vernon W. Taylor, their agents, assigns, successors in interest and those acting in concert with them, all individually and in their official capacities,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued April 2, 1979 Decided April 10, 1979

Before WINTER, HALL and PHILLIPS,
Circuit Judges.

PER CURIAM:

Plaintiff, a physician licensed by the defendant Board of Medical Examiners, appeals from summary judgment entered for defendants, entered after the district court ruled that the defendants, as an administrative agency of the State of North Carolina and as individual members, are immune to plaintiff's claim for damages and that plaintiff failed to show "special facts and circumstances" constituting bias or prejudice on the part of certain of the individual defendants which should disqualify them from participating in a hearing of the charges alleged against plaintiff by the Board.

From our consideration of the record and the arguments, both oral and written, we perceive no error.

AFFIRMED.

N.C.Gen.Stats. § 90-14 (Supp. 1971) provides:

> The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or is habitually addicted to the use of marijuana, barbiturates, demerol or any other habit-forming drug or derivative of such drug, or has by false and fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds an earned diploma or degree, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude, or has been adjudicated a mental incompetent or whose mental condition renders him unable safely to practice medicine. Upon the hearing before said Board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. And, for any of the above reasons, the said Board of Medical Examiners may refuse to issue a license to an applicant. The findings and actions of the Board of Medical Examiners in

revoking or rescinding and refusing to issue licenses under this section, shall be subject to review upon appeal to the superior court, as hereinafter provided in this article. The Board of Medical Examiners may, in its discretion, and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked and rescinded.